No. 18538

United States Court of Appeals
For the Ninth Circuit

United Steelworkers of America, AFL-CIO, and Local No. 6 of the United Steelworkers of America, AFL-CIO, *Appellants,*

vs.

Northwest Steel Rolling Mills, Inc., a corporation, *Appellee.*

Appeal from the United States District Court for the Western District of Washington, Northern Division

APPELLANTS' REPLY BRIEF

Kane & Spellman
Attorneys for Appellants.

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SUMMARY OF REPLY ARGUMENT

In this brief, appellants reply to new contentions made in appellee's brief, replying to Section A of said brief under the heading:

I. Management's Functions Were Not Usurped by the Arbitrator;

and replying to Section B of said brief under the heading:

II. The Court Was Not Prohibited from Interpreting the Stipulation to Arbitrate in Accordance with the Contract and Contemporaneous Documents and Statements.

REPLY ARGUMENT

I.

Management's Functions Were Not Usurped by the Arbitrator.

The argument that the arbitrator's award herein violated management's reserved prerogatives under the contract, which is set forth on pages 12 and 13 of appellee's brief, results from a strained interpretation of the clause entitled "Management's Functions" and a complete disregard of the other sections of the contract.

Truly, the company has the right to direct operations and make job selections, "provided, however, that in the exercise of such functions, the Management shall observe the provisions of this Agreement" (R. 8, page 10). The primary provisions of the agreement limiting the company's rights herein were Article IX, Section 1, on "Seniority" (R. 8, page 23); Article XI on Grievances and Arbitration (R. 8, pages 27 and 28); and the Letter of Agreement executed contemporaneously with the new contract (R. 8, pages 41 and 42). In the July 7, 1960, Letter of Agreement, the parties specifically agreed that, in filling the new jobs, present eligible employees "shall be given preference, subject to Section 1 of Article IX of the Basic Agreement, in filling such job openings . . . " (R. 8, page 42). As a result of the aforesaid contract provisions, management's rights in filling the contested jobs were severely restricted; and the arbitrator was free to interpret the intent of the parties and formulate an equitable award, after the company had been given the right of filling the jobs in accordance with the contract and had failed.

In *United Steelworkers v. Warrior & Gulf Navigation Company,* 363 U.S. 574 (1960), the Supreme Court has commented at length on management's so-called prerogatives in the face of collective bargaining agreements containing absolute no strike clauses. The following pertinent comments were included in that discussion:

> "Collective bargaining agreements regulate or restrict the exercise of management functions . . . When . . . an absolute no strike clause is included in the agreement, then in a very real sense everything that management does is subject to the agreement, for either management is prohibited or limited in the action it takes, or if not, it is protected from interference by strikes . . .
>
> " 'Strictly a function of management' might be thought to refer to any practice of management in which, under particular circumstances prescribed by the agreement, it is permitted to indulge. But if courts, in order to determine arbitrability, were allowed to determine what is permitted and what is not, the arbitration clause would be swallowed up by the exception. Every grievance in a sense involves a claim that management has violated some provision of the agreement." (pages 583 and 584.)

If, after the company had made selections to fill the new jobs and had done so in violation of the agreement, the arbitrator could do no more than say the company had violated the contract, the patently unreasonable and prohibitively expensive situation would exist of the company being able to reselect the same man, or another equally in violation of the contract. The union on behalf of the senior employees would then have to go to arbitration after arbitration, ad infinitum, without

ever securing the jobs for those entitled to them; and with no result other than a series of decisions that the company had violated the contract.

Carrying the company's argument to its logical conclusion, the company demands unrestricted right to promote, retire, suspend, fire or lay off. An arbitrator could not reverse any such decision by requiring promotion, retirement or reinstatement, because the company had violated the contract. The company argues that in any of these situations, because of management's prerogatives, all an arbitrator can do is say the company is wrong, and that the company is then free to redeliberate and repeat the violation or make new decisions in violation of the contract.

Both the agreement between the parties and a common sense approach to industrial peace negate the company's claim that it has a continuing unrestricted right to make job selections, even after violating the agreement in making those selections.

Most of the other contentions raised by appellee in Section A of its argument have been fully considered in appellant's brief.

None of the cases cited by appellee were decided on the basis that the arbitrator had exceeded his authority under the submission agreement. Most of the cases, including *Smith and Wesson, Inc.,* 10 War Labor Reports 148, *The Textile Workers Case,* 291 F.2d 894 (4th Cir.—1961); and *The Consolidated Vultee Case,* 160 P. 2d 113 (Calif.—1945), are decided on findings that the arbitrator had violated *contractual restrictions* of his power to act; while the *Otis Elevator Case,* 201 F.Supp.

213 (D.C.N.Y.—1962) and *Application of MacMahon,* 63 N.Y.S.(2d) 657 (1946) were decided on public policy and the New York arbitration law, respectively.

These cases do not support the appellee's allegation that the submission agreement, regardless of contract language, is the sole source of the arbitrator's power. The contract's language was all important in each case. The contract involved in each of the first three above-cited cases had an express limitation of the arbitrator's authority under the arbitration clause. In *The Consolidated Vultee Case,* 160 P.(2d) 113 (Calif.—1945), the contract contained the following limitation of the arbitrator's power:

> "The permanent referee shall not have the jurisdiction to arbitrate provisions of a new agreement or to arbitrate away, in whole or in part, any provisions of this agreement." (page 116)

Discussing this clause and those similar to it in other cases, the court said:

> "It seems clear that the special clause limiting the powers of the referee was inserted for the specific purpose of qualifying the general provisions for arbitration and it is therefore controlling. Sec. 1859 Code of Civ. Prac.; Smith & Wesson, Inc., 10 War Labor Reports, 148, 151 . . . "

The contract involved in the case before this court (R. 8) contains no similar limitation of the arbitrator's authority.

II.

The Court Was Not Prohibited from Interpreting the Stipulation to Arbitrate in Accordance with the Contract and Contemporaneous Documents and Statements.

In Section B of its brief appellee, in effect, attempts to apply the parol evidence rule to prohibit a consideration of the collective bargaining agreement or the contemporaneous documents and statements of the parties, in interpreting the intent of the parties in the March 13 stipulation. In the case of *Pacific Northwest Bell Telephone Co. v. Communications Workers of America,* 310 F.(2d) 244 (9th Cir.—1962), this Court had occasion to consider a similar claim, although there the claim was that the court could not go beyond the language of the collective bargaining agreement and consider the bargaining history in attempting to determine the intent of the parties. The following language from that opinion is pertinent:

> "The first question related to the parol evidence rule. Appellee asserts (and apparently the district court agreed) that evidence of bargaining history in this case would serve to change, vary and contradict the terms of the agreement, and that all prior understandings must be merged into the expressions of the written contract.
>
> "We cannot agree. It simply cannot be said that as to the arbitrability of disciplinary suspension the contract's meaning is plain when the fact is that the contract is silent. As has been frequently pointed out, agreements of this sort are far different in nature and purpose from the ordinary commercial agreement. They are in effect a compact of self-government. As pointed out in United Steel-

workers of America, v. Warrior & Gulf Navigation Co., 1960, 363 U.S. 574, 580-581 . . . :

"'Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown even to the negotiators.'

"Mr. Justice Brennan, concurring in American and Warrior, supra, at page 570 . . ., states:

"'Words in a collective bargaining agreement, rightly viewed by the Court to be the charter instrument of a system of industrial self-government, like words in a statute, are to be understood only by reference to the background which gave rise to their inclusion. The Court therefore avoids the prescription of inflexible rules for the enforcement of arbitration promises. Guidance is given by identifying the various considerations which a court should take into account when construing a particular clause—considerations of the milieu in which the clause is negotiated and of the national labor policy.'

"We conclude that the parol evidence rule does not apply here to preclude examination of the bargaining history upon the question of the arbitrability of this dispute" (Page 247).

In Section B of appellee's brief, arguing that no material issues of fact existed, the appellee has relied heavily and repeatedly on the reply affidavit served and filed by counsel for the appellee company on the morning of the hearing of the motion for summary judgment (R. 80-85). Repeatedly, appellee attempts to strengthen its case by citing the allegations of this affidavit to show that the parties had a settled practice of

replacing the grievances and the contract by arbitration stipulation agreements and that the arbitration hearing gave the arbitrator no facts upon which to base a positive award (Appellee's brief, pages 2, 3, 13, 15, 16 and 17).

For the purposes of the summary judgment hearing, the statements in the reply affidavit had to be considered denied and could not be the basis for summary judgment. Judgment could not be entered against the appellants based on new allegations which they had no opportunity to refute. The evidence was required to be viewed in the light most favorable to appellants and appellants' allegations regarded as true. *United States v. Diebold,* 369 U.S. 654 (1962), *Guinn Company v. Mazza,* 296 F.(2d) 441 (D.C. Cir.—1961).

CONCLUSION

Having replied to the new contentions in appellee's brief, appellants urge that the prayer of their original brief be granted.

Respectfully submitted,

KANE & SPELLMAN,
Attorneys for Appellants

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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JOHN D. SPELLMAN
Attorney